

IN RE ATTORNEY'S FEES REQUEST OF RONALD CLABAUGH 1/

IBIA 81-36-A

Decided May 26, 1982

Appeal from decision by the Commissioner of Indian Affairs denying payment of attorney's fees claimed pursuant to provisions of the Indian Child Welfare Act of 1978.

Affirmed as modified.

1. Attorney's Fees: Indian Child Welfare Act of 1978

Under the circumstances of this case, there is no authority under the Indian Child Welfare Act of 1978 to pay attorney's fees to appellant.

APPEARANCES: Ronald Clabaugh, Esq., pro se; David C. Etheridge, Esq., Office of the Solicitor, Department of the Interior, for appellee Commissioner. Counsel to the Board: Kathryn A. Lynn.

1/ In a Notice of Docketing issued by the Board on July 17, 1981, this case was styled Edward Star, et al. v. Commissioner of Indian Affairs. This style has been changed in order to describe more accurately the appeal.

OPINION BY ADMINISTRATIVE JUDGE ARNESS

Background

On March 10, 1978, following a hearing in the Oglala Sioux Tribal Court initiated upon complaint by the tribal prosecutor that Hope, Faith, Edward, J. Donovan, Elliot, Edsel, and Kahyle Star were dependent children, an order was entered referring the children to the South Dakota Social Services Department for temporary custodial placement. A subsequent hearing was held by the tribal court on May 12, 1978, at which time the children were placed under the custody of the tribal court, with supervision to be exercised by the State Social Services Department. The children remained in temporary foster care for 2 years.

On June 17, 1980, the tribal court reviewed the circumstances of the children. The children were represented by the tribal prosecutor at this hearing. The tribal court continued its prior orders in the matter for 3 months, and ordered a psychological evaluation of the children's mother and a report to it on Von Recklinghausens Disease, a degenerative nerve disorder that afflicted several of the children. The tribal court order recited an intention to hold another hearing in 3 months, following receipt of these reports, to determine whether the parental rights of the children's mother should be terminated.

On November 4, 1980, a South Dakota Circuit Court, reciting a report made to it by the State Welfare Department, entered an order finding that Edward, Elliot, Edsel, and Kahyle Star were residents of the circuit over which it exercised jurisdiction and appointing Ronald Clabaugh to be their attorney "in regard to certain Orders entered by the Oglala Sioux Tribal Court placing said children under the supervision of the State Welfare Department." 2/ This order was entered more than 3 months after the tribal court's June 17, 1980, order, but before the tribal court had held the further hearing contemplated in that order. The State court's order does not evidence any awareness of the tribal court's most recent action in regard to the children.

Following a hearing held on December 12, 1980, the tribal court ordered the State Social Services Department to find long-term placement for the children.

Ronald Clabaugh (appellant), following the order from the State court, presented a bill to the Department of the Interior for services rendered in connection with further proceedings before the tribal court. The bill, which indicates that appellant began work on the children's behalf on October 17, 1980, includes expenses incurred in connection with appearances before the tribal court, including travel, telephone, official fees

2/ Nov. 4, 1980, order, South Dakota Seventh Judicial Circuit Court.

advanced, and licensing by the tribal court as well as attorney's fees earned until December 19, 1980.

On April 15, 1981, the Commissioner of Indian Affairs (Commissioner), in a decision based upon an interpretation of the Indian Child Welfare Act of November 8, 1978 (Act), 92 Stat. 3069 (codified at scattered sections of 25 U.S.C.), set forth in a seven page legal opinion, refused to allow payment of appellant's fees from funds of the United States. ^{3/} At page 4 of his decision, the Commissioner sets out the reason for his holding:

Section 1912 [of the Act] applies to "any involuntary proceeding in a state court" [Emphasis supplied]. The legislative history of the Act removes any doubt that the appointed counsel provisions are directed at state court rather than tribal court adjudications:

"Subsection (b) provides that an indigent parent or Indian custodian shall have a right to court appointed counsel in any involuntary state proceeding for foster care placement or termination of parental rights. Where state law makes no provision for such appointment, the Secretary is authorized, subject of the availability of funds, to pay reasonable expenses and fees of such counsel." [Emphasis supplied]

H.R. Rep. No. 1386, 95th Cong. 2d Sess. 22 (1978).

Congress had previously decided explicitly not to impose on Indian tribes the requirement that they provide appointed

^{3/} Federal counsel has directed argument to the authority of the Board to review "discretionary" decisions of Bureau officials in apparent anticipation of a ruling adopting arguments by appellant that payment of attorney's fees may be allowed without statutory or regulatory basis in law. For a discussion of the meaning of the limitation upon the Board's authority to review "discretionary" actions by the Bureau, see St. Pierre v. Commissioner, 9 IBIA 203, 89 I.D. 132 (1982) and Aleutian/Pribilof Islands Ass'n v. Acting Deputy Assistant Secretary, 9 IBIA 254, 89 I.D. 196 (1982).

counsel in tribal courts when it enacted the Indian Civil Rights Act. 25 U.S.C. § 1301 et seq. This exception was made even though many other restrictions imposed on state and federal governments by that Act were imposed on tribal governments. Tom v. Sutton, 533 F.2d 1101 (9th Cir. 1976). Nothing in the Indian Child Welfare Act indicates any decision of Congress to alter this policy. Although the high rate of removals [of Indian children from Indian families and tribes] occurring in state courts led Congress to take steps to assure that indigent Indians had counsel to assist them in presenting their arguments in state court, no such concern with respect to tribal courts existed.

Appellant filed an appeal from this decision with the Board on June 2, 1981.

Discussion and Conclusions

Appellant contends that the Act requires his fees to be paid from Federal funds administered by the Bureau of Indian Affairs (Bureau). In support of this contention he argues (1) the appointment of an attorney by the State court was required by an emergency situation; (2) the children had little contact with their Indian heritage for a significant period and jurisdiction had therefore passed to the State court in this instance to enable the court to make a binding order appointing an attorney for them; (3) the children have a constitutional due process right to an attorney appointed at public expense to represent them because of their indigence; (4) effective implementation of the statutory mandate of the Indian Child Welfare Act is impossible in this case without the assistance of appointed counsel; (5) but for the intervention of the State court, the children would

have been unrepresented in this matter; (6) the Snyder Act of November 2, 1921, 42 Stat. 208, codified as amended at 25 U.S.C. § 13 (Supp. II 1978), provides a vehicle for payment of attorney's fees in the event the Indian Child Welfare Act does not provide a basis for payment; and (7) the Department is obligated to pay these attorney's fees under binding regulations codified at 25 CFR 23.13(a) which require payment under the circumstances of this case.

The Indian Child Welfare Act was declared by Congress to be an attempt to promote the stability of Indian families and tribes. 4/ The Act's primary purpose is to avoid removal of dependent Indian children from their Indian culture when they are taken from Indian parents who are unable to continue to care for them. 5/ Tribal jurisdiction over affected reservation children and children who, like those involved in this case, are wards of a tribal court, is made exclusive by the Act, 6/ which imposes strict procedural limitations upon state and private welfare agencies dealing with dependent Indian children. 7/

The provisions of the Act for court-appointed counsel appear at 25 U.S.C. § 1912(b) (Supp. II 1978), which, referring to state proceedings (see section 1912(a)), reads:

4/ 25 U.S.C. § 1902 (Supp. II 1978).

5/ Id. section 1901(4) and (5). The Act is limited in scope to "Indian child" custody proceedings." 25 U.S.C. § 1903(1) and (4) (Supp. II 1978).

6/ Id. section 1911(a).

7/ Id. section 1901(4).

In any case in which the court determines indigence, the parent or Indian custodian shall have the right to court-appointed counsel in any removal, placement, or termination proceeding. The court may, in its discretion, appoint counsel for the child upon a finding that such appointment is in the best interest of the child. Where State law makes no provision for appointment of counsel in such proceedings, the court shall promptly notify the Secretary upon appointment of counsel, and the Secretary, upon certification of the presiding judge, shall pay reasonable fees and expenses out of funds which may be appropriated pursuant to section 13 of this title. [8/]

Implementing regulations for this section appear at 25 CFR 23.13. Contrary to appellant's assertions, payment of his fees is not required under the above statutory authority or its implementing regulations.

First and foremost, appellant's contention that the children were unrepresented is refuted by the record of proceedings in the tribal court. The original 1978 hearing was initiated by the tribal prosecutor

8/ "Section 13 of this title" is the Snyder Act of 1921, which authorizes the Bureau, under the supervision of the Secretary of the Interior, to direct the expenditure of congressional appropriations for the benefit, care, and assistance of Indians. The Snyder Act is a legislative procedural act, intended to facilitate the passage of subsequent Indian appropriation bills, including annual Bureau budget appropriations. See discussion of the purposes of the Snyder Act, F. Cohen, Handbook of Federal Indian Law (1982 ed.) at 141, 142. It appears appellant's argument that the Secretary ought to approve the payment of attorney's fees as a discretionary matter under authority of the Snyder Act is made as an alternative to the contention that he is entitled to payment of fees under the Indian Child Welfare Act. As Federal counsel points out, this Board does not have power to review purely discretionary decisions by Bureau officials, but must decide cases presented to it based upon legal considerations. Furthermore, Federal counsel advises that the BIA, in exercise of its discretion, has decided to pay attorney fees for clients in Indian child custody cases in tribal court only when an Indian tribe or organization has obtained a grant for that purpose under 25 U.S.C. § 1931(a)(8).

on behalf of the children. The 1980 tribal court order recites: "[P]arties present at this proceeding were: Lester White Butterfly, Tribal Prosecutor representing the children, Ardith Sand, Social Services of Rapid City, Mrs. Anna Mae Blume, Social Services of Custer County, Sandi Bird and William J. Grubbs of Social Services Department in Pine Ridge, South Dakota." 9/ In the absence of a direct evidentiary attack upon this record, it is accepted as correct. There was, therefore, no need for a court-appointed attorney to represent the children.

[1] Furthermore, even if the facts had indicated a need for a court-appointed attorney, the State court was without jurisdiction to appoint such an attorney in this case. In support of his claim that the State court had jurisdiction over the children and therefore had the authority to appoint him to represent them, appellant cites 25 U.S.C. § 1922 (Supp. II 1978). That provision, which authorizes a state court to exercise emergency jurisdiction over children located off the reservation even though they are normally subject to exclusive tribal jurisdiction, applies only when state court intercession is necessary "to prevent imminent danger of physical damage or harm to the child." Appellant has not alleged and the State court did not find that the children were in imminent danger of physical damage or harm. 10/ Therefore, section 1922 does not provide a basis for State court jurisdiction.

9/ Order of Oglala Sioux Tribal Court dated June 17, 1980.

10/ See note 2, *supra*. Appellant argues that the children's placement was "temporary" rather than "permanent" and that this condition was harmful. Even assuming that temporary placement may, in some way, be "harmful" to a child, such harm is not the actual, physical danger contemplated in the statute.

Appellant's argument that the children had lost significant contact with their Indian heritage during foster care does not confer jurisdiction upon the State court. Nowhere does the Act provide that children under the active supervision of a tribal court can come under the jurisdiction of a state court merely because their foster care is provided in homes outside the reservation.

Since this case was never properly in State court, it was not transferred from State court to tribal court as appellant attempts to argue. Rather it has always been pending before the tribal court, which here exercises the exclusive jurisdiction provided for by 25 U.S.C. § 1911(a). Because the State court never had jurisdiction, there is no statutory basis 11/ for payment of attorney's fees to appellant. 12/

Finally, contrary to appellant's contentions, the due process provisions of the United States Constitution do not require a court-appointed attorney because the children are indigent. These Federal constitutional provisions do not apply to actions in tribal court. 13/ The possibility that Federal legislation may have influenced the nature and extent of tribal

11/ The regulations in 25 CFR 23.13 can go no further than the statute they implement. Because the Act does not authorize payment of attorney's fees in this case, the regulations cannot provide an independent basis for awarding fees.

12/ This opinion does not reach the suggested question posed by appellant involving a situation where an attorney is appointed by a state court having jurisdiction over an Indian child custody matter which is subsequently transferred to tribal court.

13/ Santa Clara Pueblo v. Martinez, 436 U.S. 49, 56 (1978).

jurisdiction does not convert tribal courts into Federal instrumentalities subject to Federal constitutional restrictions. 14/

Even if Federal constitutional law did apply, the Supreme Court recently observed in Lassiter v. Department of Social Services, 452 U.S. 18, 25 (1981), also a child custody case: “The pre-eminent generalization that emerges from this Court’s precedents on an indigent’s right to appointed counsel is that such a right has been recognized to exist only where the litigant may lose his physical liberty if he loses the litigation.” The Court then held that only where compelling circumstances exist do concerns for due process outweigh the general presumption that there is no right to appointed counsel when personal liberty is not at stake. 15/ No such circumstances have been shown to exist in this case.

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1, the April 15, 1981, decision of the Commissioner denying payment of attorney’s fees to appellant is affirmed as modified by this decision. 16/

14/ United States v. Wheeler, 435 U.S. 313, 328 (1978).

15/ It is noted that in 25 U.S.C. § 1302(6) (1976), the Indian Civil Rights Act limits the right to counsel in criminal cases to counsel at the defendant’s own expense. Since there is no right to appointed counsel in criminal cases where personal liberty is frequently at stake, it would be incongruous to maintain that the due process clause of the Indian Civil Rights Act requires appointed counsel in a dependent child proceeding where no loss of personal liberty is threatened.

16/ Because of the Board’s disposition of this case, it does not reach the question, addressed in the Commissioner’s decision, whether award of attorney’s fees is limited to state court proceedings.

This decision is final for the Department.

Franklin D. Arness
Administrative Judge

We concur:

Wm. Philip Horton
Chief Administrative Judge

Jerry Muskrat
Administrative Judge